No. 109

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

CITY OF YONKERS and JOHN W. TOOLEY, JR., as President of Committee of Yonkers Commuters, etc.,

Appellants,

against

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION and THE NEW YORK CENTRAL RAILROAD COMPANY.

BRIEF OF APPELLANT, JOHN W. TOOLEY, JR.

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STATEMENT.

This is an appeal from a final judgment of a Statutory Court sitting pursuant to §§ 41(28), 43-47, Title 28, U. S. Code, in the Southern District of New York, which denied injunctive relief and dismissed the complaint in the within action brought to vacate, enjoin and set aside a certificate and order issued by the Interstate Commerce Commission (hereinafter referred to as the Commission) purporting to authorize The New York Central Railroad Company to abandon that part of an intrastate, inter-urban, electric passenger railway extending a distance of approximately 3.1 miles between Van Cortlandt Park Junction, New York City, N. Y., and Getty Square, Yonkers, N. Y.

OPINION BELOW.

The opinion below is printed at pages 381-385 of the Record. The Judgment is found at page 385. No Finding of Facts under Rule 52, F. R. C. P. was filed.

JURISDICTION.

The judgment of the Statutory Court was entered on June 10, 1943 (R. 385). A motion made on behalf of the United States of America to affirm the judgment below was denied by this Court on June 21, 1943 (R. 400). The jurisdiction of this Court is invoked under §§ 47 and 47a of Title 28, U. S. Code.

QUESTIONS PRESENTED.

1. Recognition of the reserved powers of the State of New York.

2. The Commission illegally usurped the exclusive jurisdiction of the Public Service Commission of the State of New York over the subject matter.

3. The due process of law guaranteed to the appellants by the Fifth Amendment to the Constitution has been violated because:

(a) The Commission is without jurisdiction to make the order questioned.

(b) Even if the Commission had jurisdiction of the subject matter:

(1) It sought and accepted evidence *ex parte* without the knowledge or consent of the appellants and in violation of one of its own rules of procedure (Rule 22).

(2) The denial by the Commission of the appellants' applications to present further newly discovered evidence as to present and

future convenience and necessity and as to probable substantial reduction in, or elimination of alleged operating loss and the affirmance thereof by the lower Court was arbitrary, capricious and unjust.

(3) The determinations by the Commission and by the lower Court are not supported by the appropriate findings of fact required by law.

PROCEEDINGS IN THE LOWER COURTS.

This appellant filed exceptions to the Examiner's Proposed Report (R. 44-57) and moved for further hearing, reconsideration and vacation of the order of March 20, 1943, and for leave to adduce material, newly discovered evidence (R. 92-98); and participated as a party in all proceedings described at pages 3-5 of the brief filed herein by the appellant, City of Yonkers, repetition of which seems unnecessary.

FACTS.

The facts material to the consideration of the questions of law raised in this brief are:

The respondent, The New York Central Railroad Company, hereinafter referred to as the New York Central, operates an electric, inter-urban passenger railway between Getty Square, Yonkers and Sedgwick Avenue, New York City, a distance of about 7.8 miles, called the Yonkers Branch (R. 17, 332).

At Van Cortlandt Park, on the line, 3.1 miles below Getty Square, the steam Putnam Division of the New York Central switches into the electric line (R. 19, 182, 348A) and the trains of the Putnam Division also use the electric tracks between the Junction and Sedgwick Avenue.

The New York Central applied to the Commission for leave to abandon only the 3.1 mile section of the Yonkers Branch between the junction at Van Cortlandt Park and Getty Square (R. 15). Such abandonment would result in the discontinuance of all electric service between Getty Square, Yonkers, and all way stations on the electric line south to Sedgwick Avenue.

The Yonkers Branch carried no freight, mail, express nor milk (R. 19-20). Its bridges are too light to support steam locomotives (R. 208). Its business was wholly intrastate, inter-urban passenger traffic, principally commuting. Passengers bound for the Grand Central Station in New York City could transfer to the electrified Hudson Division of the New York Central at University Heights and at Highbridge (R. 188) where the tracks of the two lines were parallel. Also, until June, 1940, passengers had transferred at the Sedgwick Avenue terminus directly to the Ninth Avenue El line and until December, 1938, to the Sixth Avenue El and these express railways carried them to downtown New York City (R. 194).

When the two elevated railways were discontinued a shuttle service was preserved (R. 194) at Sedgwick Avenue over the elevated tracks to permit passengers to transfer to the Independent Subway at 155th Street on the west side of the Harlem River and to the Interborough Subway, Lexington Avenue Line, at 167th Street. This service, however, was slow and inconvenient.

Immediately before the Sixth and Ninth Avenue elevated services were discontinued, the New York Central ran 43 trains daily and 5 on Sundays on the Yonkers Branch to and from Sedgwick Avenue (R. 17) and while the El lines acted as feeders the Branch apparently operated at a profit.

After the filing of the Proposed Report of the Examiner the Committee of Yonkers Commuters learned (R. 359-60) that the City of New York had included in its schedule of post-war projects the extension of the West Side Subway from 145th Street and Lenox Avenue to 155th Street where it would join the tracks of the shuttle train which had been kept in operation for this very purpose, and run through the station at Sedgwick Avenue to connect with the Lexington Avenue Subway at 162nd Street. This extension when made would restore quick connections between the Sedgwick Avenue terminus of the Yonkers Branch and downtown New York via the New York City Rapid Transit system and would re-establish the traffic which had formerly been carried by the Sixth and Ninth Avenue elevated lines as feeders to the Yonkers Branch at Sedgwick Avenue. This appellant, accordingly, asked leave to introduce this new evidence (R. 93, 94, 98) but his application was denied (R. 110).

Further facts are detailed by the appellant, City of Yonkers, at pages 5-9 of its brief herein and are thought to require no repetition.

SPECIFICATION OF ERRORS TO BE URGED.

This appellant urges all the errors assigned (R. 389-91).

ARGUMENT.

POINT I.

THE COMMISSION IS WITHOUT JURISDICTION OF THE SUBJECT MATTER OF ITS ABANDONMENT CERTIFICATE AND ORDER OF MARCH 20, 1943, HEREIN BECAUSE THE YONKERS BRANCH IS AN INTER-URBAN ELECTRIC RAILWAY WHICH, UPON THE RECORD, IS NOT OPERATED AS A PART OR PARTS OF A GENERAL STEAM RAILROAD SYSTEM OF TRANSPORTATION.

The Commission asserts jurisdiction of this proposed abandonment under the provisions of § 1 (18)

of the Interstate Commerce Act (49 U. S. C., § 1 [18]) which provides:

> "* * * No carrier by railroad *subject to this chapter* shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or *future* public convenience *and necessity* permit of such abandonment." (Italics supplied.)

But the Yonkers Branch is not "subject to this chapter" because roads of its type are expressly excluded from the jurisdiction of the Commission by § 1 (22) of the same Act which provides:

> "The authority of the Commission * * * shall not extend to the * * * abandonment * * * of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation."

There is no dispute that the Branch is an interurban, electric line that is exclusively a passenger carrier and that it makes no interchange of standard freight equipment of any character.

Neither the Commission nor the lower Court has made any finding of facts defining the Yonkers Branch as a part "of a steam railroad system of transportation." Besides, there is no evidence in the Record that would support such a finding or which would take the Branch out of the category described by this Court in *U. S. v. Chicago, N. S. & M. R. R. Co.*, 288 U. S. 1; and in *Piedmont & Northern R. Co. v. I. C. C.*, 286 U. S., 299, 307.

The defect goes to the jurisdiction of the Commission and is fatal to the validity of the order and certificate under attack.

This Court is in no position to pass upon the jurisdictional question here involved without a detailed scrutiny of the evidence as though a court of first instance.

And this situation exists in spite of the strong condemnation of such practices of the Commission by this Court in *Beaumont, S. L. & W. Ry. Co. v. U. S.*, 282 U. S. 74, at page 86.

Again, as this Court said in *Florida v. U. S.*, 282 U. S. 194, at page 208:

> "Such a conclusion would not only require evidence to support it but findings of appropriate definiteness to express it."

There is no presumption of law that the Commission has jurisdiction of the abandonment of a line that is an inter-urban electric railway.

Jurisdiction of the Commission is a mixed question of fact and law (*U. S. v. Idaho*, 298 U. S. 105, 109). There is no support in this record for the legal conclusion that the Commission has jurisdiction of this Branch.

Since it has not been shown to have jurisdiction of the subject matter, its order and certificate violate the due process clause of the Fifth Amendment to the Constitution.

POINT II.

THE COMMISSION IS WITHOUT JURISDICTION OF THE SUBJECT MATTER BECAUSE THE YONKERS BRANCH LIES WHOLLY WITHIN THE BOUNDARIES OF THE STATE OF NEW YORK AND THE RECORD CONTAINS NO FINDINGS OF FACT NOR EVIDENCE SUFFICIENT IN LAW TO ESTABLISH JURISDICTION THEREOF IN THE COMMISSION.

The Commission is also faced with a still more difficult obstacle to the validity of its order and certificate.

The Commission derives whatever power it has fundamentally from the Commerce Clause in § 8 of Article I of the Federal Constitution, viz:

> "The Congress shall have Power to * * * regulate Commerce with foreign Nations, and *among* the several States * * *" (Italics supplied.)

This delegation of authority is limited by the Tenth Amendment to the Constitution, viz:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

It is an undisputed fact that the Yonkers Branch lies wholly within the State of New York. There is no evidence and no finding in this Record that it is engaged in interstate commerce in the slightest degree.

Hence, from the physical standpoint, the Commission has no jurisdiction over the abandonment of the Branch. That jurisdiction lies solely within the power of the State regulatory body.

The jurisdiction asserted by the Commission is a derived jurisdiction based upon the ruling of this Court in *Colorado* v. *U. S.*, 271 U. S. 153.

The *Colorado* case can jibe with the Constitution only upon the theory that Congress—and, derivatively, the Commission—may interfere with local intrastate transportation matters when it clearly appears *as a matter of law* that the continued operation of the intrastate railway would impose an *undue burden* upon interstate commerce.

Such *undue* burden should actually, and as a legal conclusion, operate to cripple the applicant's main line, or affect its utility or service as an artery of interstate

and foreign commerce, or operate as an obstruction to interstate commerce. On this feature there is evidence only that on the basis of 1940 and 1941 results the Branch would show an alleged operating deficit of some $56,000 (R. 35) and that the net earnings of the New York Central system have been consistently increasing by leaps and bounds ever since 1938 (R. 29). No application to abandon this Branch was made in 1938 when the system was operating at a net loss.

Unless the doctrine of the *Colorado* case is applied with the rigidity of a statute, the door would be opened to the Commission to invade and usurp the sovereign powers of the State as a matter of *discretion* and not as a matter of law.

As already shown, the question of jurisdiction of the Commission is a mixed question of law and fact. And a conclusion of law is impossible without a prior finding of facts as a basis for it.

In the case at bar, the Commission made no finding of facts that can support a *legal conclusion* that "its order removes an obstruction which would otherwise prevent the railroad from performing its federal duty" (*Colorado v. U. S., supra*, pp. 162-3).

The New York Central itself did not claim in its application that its alleged operating loss constitutes an *undue burden* on interstate commerce (R. 25).

Anything less than a clear conclusion of law based upon an adequate finding of facts would impose the discretion of the Commission upon the State of New York in its domestic affairs—a result abhorrent to every principle of Constitutional law and derogatory to every sovereign power of the State of New York.

That is just what has happened in this case.

Due process of law has been denied these appellants through the infringement of their rights by an

order of a governmental body that is without jurisdiction to affect them and the denial of relief by the lower Court.

POINT III.

WHERE CONFLICT OF JURISDICTION EXISTS BETWEEN THE COMMISSION AND A STATE REGULATORY BODY, ALL DOUBTS MUST BE RESOLVED IN FAVOR OF THE EXCLUSIVE JURISDICTION OF THE STATE REGULATORY BODY.

The abandonment of the Yonkers Branch presents a matter of purely local concern affecting domestic transportation problems which, according to every rule of logic, should be resolved by the State regulatory body.

Obviously, the State regulatory body is infinitely better qualified to deal with local conditions than a nationwide Commission.

If, perchance, either party feels aggrieved by the action of the State regulatory body, he may have recourse to the Courts of the State and this Court may review by *certiorari* if so disposed.

No convincing reason is apparent why such purely local controversies should be foisted upon the Federal Courts to clog their dockets and find their way into this Court through statutory right of appeal by reason of efforts of the Commission to expand its jurisdiction beyond the plain language and reasonable intent of the statute from which it derives its powers.

From the very earliest times, this Court has been extremely chary of permitting any invasion of the reserved powers of the States by expansive, subordinate agencies of Congress.

If the bald conclusion of "undue burden" need alone be invoked as an *open sesame* to unlimited interference in the domestic affairs of the states, it would be too much to expect that there would be any voluntary restriction of so broad a field for expanding endeavor.

But when "undue burden" is held down to a strict legal conclusion—especially where conflicting state rights are involved—which must be clearly and strongly supported by findings of facts which, in turn, must be buttressed by competent evidence in the record, then abounding bureaucracy will be held in check and the requirements of due process of law will be accorded the protection and respect that the Constitution demands.

A recent expression of the salutary policy of this Court appears in *Palmer* v. *Massachusetts*, 308 U. S. 79, at pages 84-5:

> "Therefore, in construing legislation this court has disfavored in-roads by implication on state authority and resolutely confined restrictions upon the traditional power of states to regulate their local transportation *to the plain mandate of Congress.*
>
> "The dependence of local communities on local railroad services has for decades placed control over their curtailment within the regulatory authorities of the state. Even when the Transportation Act of 1920, 49 U. S. C. A. § 1(18-20), gave the Interstate Commerce Commission power to permit abandonment of local lines when the over-riding interests of interstate commerce required it, *Colorado* v. *U. S.*, 271 U. S. 153, * * * this was not deemed to confer upon the Commission jurisdiction over curtailment of service and *partial discontinuances.*" (Italics supplied.)

In the case of *Florida* v. *U. S.*, 282 U. S. 194, this Court said at pages 211-12:

> "The propriety of the exercise of the authority must be tested by its relation to the purpose of the grant and with suitable regard to

> the principle that whenever the federal power is exerted within what would otherwise be the domain of state power, the *justification* of the exercise of the federal power *must clearly appear*. *Illinois C. R. Co.* v. *State Public Utilities Commission*, 245 U. S. 493." (Italics supplied.)

This is not a case where a Federal act purports to override a state law because of repugnance or conflict in a field where Congress has been granted the power to legislate, but rather an actual invasion of a reserved field of State authority by a subordinate agency of Congress without even an alleged factual foundation found by it to support a legal right to do so.

A clear limitation of jurisdiction is provided by the Transportation Act under which the Commission functions (49 U. S. C. § 1[1] and [2]) in the language:

> "(1) The provisions of this chapter shall apply to common carriers engaged in—
>
> (a) The transportation of passengers * * * from one State * * * to any other State * * *.
>
> (2) The provisions of this chapter * * * shall not apply—
>
> (a) To the transportation of passengers * * * wholly within one State * * *."

Again, this Court said in *Sinnot* v. *Davenport*, 22 How. 227, which involved an application of the navigation laws, at page 243:

> "We agree, that in the application of this principle of supremacy of an Act of Congress in a case where the State law is but the exercise of a reserved power, *the repugnance or conflict* should be *direct and positive*, so that the two

acts *could not* be reconciled or consistently stand together; and also, that the Act of Congress should have been passed in the exercise of a clear power under the Constitution, such as that in question." (Italics supplied.)

The appellants, therefore, have been denied due process of law through the illegal intrusion of a body foreign to the State which undertakes to permit the abandonment of this wholly intrastate electric passenger railway.

POINT IV.

THE APPELLANTS ARE ENTITLED TO A FULL AND FAIR HEARING ACCORDING TO THE LAW OF THE LAND UPON AN APPLICATION FOR ABANDONMENT UNDER 49 U. S. C. § 1(18-21), BUT THE REQUIREMENTS OF DUE PROCESS OF LAW HAVE BEEN DENIED TO THEM HEREIN THROUGH THE ARBITRARY AND CAPRICIOUS ACTION OF THE COMMISSION AND BY THE LOWER COURT.

First, the appellants have been denied due process of law because of two occurrences set forth in the Record.

During the argument before the Statutory Court this amazing statement was made by the attorney for the Commission (R. 151):

> "Under our cooperative plan with the War Department and the War Production Board, we notify them of applications for permission to abandon as these are filed and advise them of the status thereof. The War Department in each case *notifies us* whether it considers the line involved of military value. The War Production Board *forwards to us as information* notices of the requisition of lines of railroads and *materials which it considers* suitable for salvage purposes. In other words, lately and during the war there has been quite a spurt in abandonment cases *owing to the desperate need* of the War Department not only for scrap metal but also for relaying rails." (Italics supplied.)

Again, while the appellants' motions for re-argument and for the admission of newly discovered evidence were pending before the Commission, the following letter was written by Mr. Robert Moses, Park Commissioner, City of New York, to the Secretary of the Commission, seeking to influence its decision on the pending motions (R. 379-80):

"The City of New York,
Department of Parks
Arsenal
64th Street and Fifth Avenue
Central Park
New York City

April 30, 1943.

Hon. W. P. Bartel,
Secretary,
Interstate Commerce Commission,
Washington, D. C.

Dear Sir:

At the request of the Mayor of the City of New York, I am writing to state the City's position in respect to the petition for re-hearing of the application of The New York Central Railroad Company, Finance Docket 13914, for authority to abandon its Yonkers Branch, which is located partly within the City of New York.

It is our opinion that the abandonment should be authorized in view of the losses entailed in operation, the existence of other adequate means of transportation, and the benefit to the City Park System which would result from the removal of the line through Van Cortlandt Park.

The suggestion in the petition for re-hearing that the City of New York will reduce the taxes on the right-of-way through Van Cortlandt Park by $10,000.00 deserves no consideration whatever. It must have been made in total

disregard of the fact that New York City collects less than $11,000.00 taxes on this property. It is obvious that talk of such reduction is idle and irresponsible, and is made solely for the purpose of prolonging the proceeding. The City has no reason for perpetuating a line through one of its important parts by reducing the taxes on that line. The taxes now paid do not compensate the City for the inconvenience caused to its citizens by the maintenance of the line through Van Cortlandt Park.

In respect to a possible Broadway subway extension, no assurance can be given that it will ever be carried out. Certainly it is not reasonable to force the New York Central Railroad to continue a non-profitable operation for many years in order to provide a connection to a non-existent and highly dubious future subway extension. I therefore request on behalf of the City that the petition for re-hearing be denied.

Very truly yours,

ROBERT MOSES, Park Commissioner,
Member of the City Planning Commission.

This letter was filed and accepted by the Commission in violation of Rule 22 of its own General Rules of Practice (adopted July 31, 1942, and effective September 15, 1942, see Rule VI(b), Fed. Code Ann., Vol. 10A, p. 762) which provides:

> "* * * every pleading, document, or paper must, when filed, or tendered to the Commission for filing, include a certificate showing simultaneous service thereof upon all parties to the proceeding."

Entirely aside from the questionable ethics of this furtive and apparently successful maneuver, the appellants were denied all opportunity to cross-examine the persons so communicating with the Commission, to

record objections to the character, materiality and competency of such evidence and to meet it with other evidence.

This Court needs no authorities to assist it in its treatment of so outrageous a violation of the most fundamental principles of due process and fair dealing.

Mr. Moses' assertions were directly contradicted by the letter from the Board of Transportation of the City of New York (R. 373—Item 2: R. 373, Paragraphs 1 and 2).

This issue of subway rapid transit extension to Sedgwick Avenue went to the question of *future* convenience and necessity as well as to the prospects of profitable operation and the appellants' motion for a rehearing should have been granted.

The appellant also sought a rehearing to show

> "(a) That Yonkers City Taxes on the right of way would be substantially reduced with consequent saving to the carrier;
>
> (b) That in the exercise of good faith the carrier could reduce its taxes paid the City of New York on the right of way through Van Cortlandt Park by several thousand dollars.

All the proffers of new evidence went directly to the reduction of the alleged operating deficit of about $56,000.

Refusal of the Commission to admit further evidence on this critical subject was clearly arbitary, capricious and unjust and a violation of the appellant's right to due process.

The lower Court ruled (R. 384) on the authority of *Woodruff* v. *U. S.*, 40 F. Supp. 949, that the appellants were not entitled to a re-hearing on the ground

that they were not entitled to any hearing in the first place before the Commission.

That ruling is in direct conflict with the decisions of this Court (*Shields* v. *Utah, Idaho Cent. R. Co.*, 305 U. S. 177, 182; *U. S.* v. *Illinois Central R. Co.*, 291 U. S. 457, 460-1); with the Fifth Amendment to the Constitution, and with § 1(19) of the Interstate Commerce Act (49 U. S. S. § 1[19]).

CONCLUSION.

The judgment of the lower Court should be reversed and the order of the Interstate Commerce Commission dated March 20, 1943, should be vacated, annulled and set aside.

Respectfully submitted,

HORACE M. GRAY,
Attorney for Appellant, Tooley.